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IN THE
COURT OF APPEALS OF INDIANA

JEFFREY REED,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 43A05-0601-CR-33
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT III
The Honorable Joe V. Sutton, Judge
Cause No. 43D03-0502-FB-25

September 7, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Jeffrey Reed, appeals his sentence following his guilty plea to Operating a Vehicle While Intoxicated Causing Death as a Class B felony[1] for which he received the maximum twenty-year sentence. Reed challenges the appropriateness of his sentence upon appeal by claiming that the trial court considered his criminal history to be an aggravator, in spite of the fact that such history consisted of misdemeanor offenses which were far removed and unrelated to the instant offense. Reed further challenges his sentence upon the grounds that the trial court failed to consider certain mitigating circumstances.

We reverse and remand with instructions.

According to the factual basis entered at the time of Reed's plea, at approximately 2:35 p.m., February 17, 2005, Reed was operating a 1994 Grand Prix at or near State Roads 19 and 250 North in Kosciusko County when he was involved in an automobile accident which resulted in the death of Matthew Moore. Prior to operating such vehicle, Reed had consumed approximately five to six beers. Following the accident, Reed was taken to a hospital, where a blood test, taken approximately two hours and fifteen minutes following the accident, indicated he had 0.25 grams of alcohol per one hundred milliliters of blood. Reed was over twenty-one years of age at the time of the accident.

On that date Reed was charged with failure to stop at the scene of a fatal accident and operating while intoxicated causing death. On approximately June 9, 2005, Reed entered into a plea agreement whereby he agreed to plead guilty to the operating while intoxicated offense, and the State agreed to dismiss its charge of failure to stop at the

[1] Ind. Code § 9-30-5-5 (Burns Code Ed. Repl. 2004).

scene of a fatal accident. During an August 24, 2005 hearing, the court accepted Reed's guilty plea and set the sentencing hearing for September 21, 2005. At the sentencing hearing, the court sentenced Reed to twenty years in the Department of Correction, with six years suspended. In enhancing Reed's sentence beyond the presumptive[2] sentence of ten years, the court considered as an aggravating factor Reed's four prior criminal convictions.

Reed urges our court to revise his sentence on the grounds that the aggravators and mitigators were not properly considered and that the sentence is inappropriate in light of his character and the nature of his offense.

We first note that Reed's plea was to a "straight up" B felony, which the court acknowledged meant that there were no limitations on the court's sentencing discretion. In Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006), our Supreme Court held that a defendant may challenge the appropriateness of his sentence in any case where the trial court exercises any discretion upon sentencing the defendant. Here, Reed's sentence was left wholly to the trial court's discretion, so his challenge to its appropriateness is properly before us. We will not revise a sentence authorized by statute unless it is inappropriate in light of the nature of the offense and the character of the offender. Jones v. State, 807 N.E.2d 58, 69 (Ind. Ct. App. 2004) (citing Ind. Appellate Rule 7(B)), trans. denied.

[2] The amended version of Ind. Code § 35-50-2-5 (Burns Code Ed. Supp. 2006) references the "advisory" sentence, reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004), reh'g denied. Since Reed committed the crime in question before the effective date of the amendments, we apply the version of the statute then in effect and refer instead to the presumptive sentence. See Ind. Code § 35-50-2-5 (Burns Code Ed. Repl. 2004).

Sentencing determinations, including whether to adjust the presumptive sentence, are within the discretion of the trial court. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies on aggravating or mitigating circumstances to modify the presumptive sentence, it must do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

In this case, after identifying Reed's criminal history as an aggravating circumstance, the trial court enhanced Reed's ten-year presumptive sentence another ten years, thereby imposing the maximum sentence for Reed's Class B felony. In imposing this sentence, the court stated the following:

> "Mr. Reed, through your choices, you've destroyed the lives of everyone here. Mr. Reed throughout the letters, everyone talked about what a good guy you were, great guy, you would give the shirt off of your back. You would do anything for you. [sic] When the chips were down, Mr. Moore needed you, Mr. Hopkins needed you, and you didn't help. That's the inconsistency with the letters. Everyone vouched for you. But in the time of need, you didn't come through. Not only didn't help, didn't summon aid and in fact left. And, although that charge will be dismissed, it's not the person that your family and friends are portraying to me in the letters. But I think your actions spoke louder than words in February. . . . The Court would impose a presumptive sentence of ten (10) years for Class D [sic] felony. The Court will enter a finding of four (4) prior convictions, criminal history, as an aggravating factor. And enhance the sentence by an additional ten (10) years. The Court will suspend six (6) of the additional ten (10) for probation." Sentencing Tr. at 21-23.

In this case, the trial court justified its imposition of the maximum sentence by identifying Reed's criminal history as the aggravator which it used to enhance Reed's sentence. We disagree, however, that Reed's criminal history is adequate to aggravate his sentence an additional ten years.

As Reed points out, in Wooley v. State, 716 N.E.2d 919, 929 (Ind. 1999), our Supreme Court concluded that the single non-violent misdemeanor of driving while intoxicated could not be used as a significant aggravator in the context of a sentence for murder. In Vasquez v. State, 762 N.E.2d 92, 97 (Ind. 2001), however, our Supreme Court, in affirming a ten-year sentence enhancement on a fifty-five year murder sentence by attributing significant weight to the defendant's criminal history, distinguished Wooley due in part to the fact that the defendant's criminal history involved three past misdemeanors rather than just one, and that the criminal history was related to the crime at issue.

Subsequently in Ruiz, 818 N.E.2d at 929, our Supreme Court again applied the Wooley reasoning in revising a defendant's maximum twenty-year sentence on his B felony child molestation conviction due to the fact that his four prior alcohol-related misdemeanor convictions were "at best marginally significant as aggravating circumstances in considering a sentence for a Class B felony." In reducing the defendant's sentence to ten years, the court disapproved of the fact that "the presumptive sentence was doubled from ten to twenty years, based on unrelated and relatively insignificant prior convictions," and that "neither the nature of the offense nor the character of the offender support[ed] an enhanced sentence." Id.

Later still, in Morgan v. State, 829 N.E.2d 12, 15-16 (Ind. 2005), our Supreme Court again observed that while a prior conviction for operating a vehicle while intoxicated may rise to the level of a significant aggravator for a subsequent alcohol-related offense, such criminal history does not command the same significance at a

sentencing hearing for murder. Id. The Court further explained that a conviction for theft six years in the past would probably not, by itself, warrant a maximum sentence for a Class B burglary, but that a former conviction for burglary might very well justify a maximum sentence for a subsequent theft. Id. at 16.

We infer from the above cases that prior criminal history should in some way bear upon the crime at hand in order to serve as an aggravator, and that in order to impose a maximum sentence, particularly on a B felony, such criminal history should not be far removed from and noticeably less egregious than the crime at issue.

Here, Reed's criminal history involves the following convictions: a February 23, 1994 conviction for public intoxication as a Class B misdemeanor; an October 3, 1995 conviction for criminal mischief as a Class A misdemeanor; a January 21, 1998 conviction for criminal mischief as a Class A misdemeanor; and a January 21, 1998 conviction for resisting law enforcement as a Class A misdemeanor. Three of his four past misdemeanors are unrelated to the offense of causing a death while operating a vehicle while intoxicated, and his criminal history is markedly less serious than the current offense.[3] Furthermore, all four convictions occurred at least seven years prior to the offense at issue and are relatively mild in comparison to the offense at issue. At the time this crime was committed, our legislature had determined that a Class B felony, including causing death while operating while intoxicated, merited a ten-year sentence

[3] Both the State and Reed appear to believe two of Reed's past misdemeanors involve alcohol. In fact, according to the pre-sentence investigation report ("PSI"), he has only one prior alcohol-related misdemeanor, dated February 23, 1994. While he was charged on May 19, 1997 with public intoxication and possession of marijuana, these charges were dismissed on January 21, 1998.

barring the finding of specific aggravators. It is difficult to see how, if the presumptive sentence for a crime as serious as causing death while operating a vehicle while intoxicated is ten years, Reed's criminal history, largely removed both in time and relevance to the crime at hand, may weigh so heavily as to double the amount of time for which he may be incarcerated. We conclude Reed's criminal history should not have carried such significant weight so as to enhance his sentence another ten years.

Reed further claims the court improperly failed to consider his proffered mitigators. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id.

Reed points out that the PSI lists as a mitigating circumstance the hardship to Reed's family that imprisonment would cause.[4] The PSI indicates that Reed stated he was the sole income-earner for his girlfriend and their two small children. In urging the court to consider two additional mitigating circumstances, Reed pointed to his remorse and the fact that he was taking responsibility for his crime by pleading guilty. None of these three mitigators was refuted by the State at sentencing.

[4] The sentencing recommendation by the Probation Officer Steffanie Bellamy in the PSI is for Reed to be sentenced to ten years.

The State argues in response that it is not uncommon for defendants to have children, and absent special circumstances, trial courts are not required to find that imprisonment will result in undue hardship. See Ware v. State, 816 N.E.2d 1167, 1178 (Ind. Ct. App. 2004); Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). In Ware, however, the defendant's dependent children lived with their mother, who supported them financially. 816 N.E.2d at 1178. In Dowdell, trial counsel did not argue undue hardship was a mitigating circumstance, and the defendant presented no evidence on the issue. 720 N.E.2d at 1154.

Here, in contrast, we note that even the State asked the court to consider the mitigator of the undue hardship of Reed's imprisonment on his dependents based upon the PSI, which indicated Reed was the sole income earner for his family. Moreover, while the court stated that he had read all of the letters sent in on behalf of both the victim and Reed, the court made no acknowledgment that the letters on behalf of Reed largely urged the court to consider the impact of imprisonment upon Reed's family, and specifically upon his children. Indeed, the context in which the court appeared to consider the letters was only in their attestations to Reed's claimed good character, which the court discounted by concluding, based upon a charge which was later dismissed, that Reed had abandoned the scene of the accident. Although we defer to a trial court's exercise of discretion regarding the finding of and weight attributed to mitigating factors, it appears here that the court simply did not consider the proffered mitigators at all. A trial court is required to articulate its evaluation and balancing of aggravating and mitigating circumstances. Ruiz , 818 N.E.2d at 928.

Similarly, the record supported Reed's claim of the mitigating factor of remorse. A defendant's expression of remorse may be considered as a valid mitigating circumstance. See Estes v. State, 827 N.E.2d 27, 29 (Ind. 2005). Reed's statements in the PSI indicate he was "deeply sorry" for causing the accident and all of the pain resulting from it, as well as the fact that he "can't stop thinking about the pain [he has] caused every person who knew or cared about [Matthew Moore.]" Appendix at 17. Further, during sentencing, due to the "emotional situation," defense counsel spoke for Reed, indicating Reed had "grief and sorrow" and that he "recognize[d] he [couldn't] undo what he did." Sentencing Tr. at 18. In spite of this demonstration of remorse, which neither the State nor the record disputes, the trial court made no mention of it upon sentencing Reed. While a trial court, which has the ability to observe the defendant directly and listen to the tenor of his voice, is in the best position to determine whether a defendant genuinely has remorse, see Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004), it appears that the trial court here simply failed to consider this proffered mitigator at all.

Reed further argues that the trial court failed to consider as a mitigator the fact of his guilty plea. Although a trial court should be inherently aware that a guilty plea is a mitigating factor, such plea is not necessarily a significant mitigating factor. See Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied. Here, in taking the plea, Reed saved the victim's family the emotional toll of a trial, and he saved the State the resources necessary for a trial. Nevertheless, the evidence showing Reed's significant level of intoxication as well as the strong evidence linking him to the crime suggest his

plea may have been just as much a pragmatic decision as an effort at taking responsibility. Again, it appears the trial court simply failed to give any consideration to this proffered mitigator.

The court's failure to articulate its reasoning, balancing, and evaluation of the above proffered and inherent mitigating factors constituted error. Scott, 840 N.E.2d at 381-84. We recognize, however, that with respect to the above three mitigators, were the trial court to have considered them, it may have concluded they did not merit significant weight. To be sure, a reduced sentence creates the same immediate undue hardship on Reed's family as the maximum sentence does, the trial court was in the best position to determine Reed's remorse, and Reed's plea bargain may have been more of a pragmatic decision than a bona fide effort at taking responsibility. Nevertheless, given Reed's criminal history, which we have already determined was inadequate to aggravate his ten-year presumptive sentence an additional ten years, we find it unnecessary to attribute specific weight, significant or not, to the above claimed mitigators.

We further note, pursuant to our power under the Indiana Constitution and Indiana Appellate Rule 7(B), that we may revise a defendant's sentence upon our determination that it is inappropriate in light of his character and the nature of his offense. Childress, 848 N.E.2d at 1079-80. Here, Reed, who was driving with a blood-alcohol content of .25 and who caused an accident resulting in the death of another person, committed a Class B felony, the presumptive sentence for which is ten years. In light of the fact that while Reed has a criminal history, such criminal history consisted of minor misdemeanor convictions at least seven years in the past at the time of the instant crime, we do not

believe the maximum twenty-year sentence is appropriate. Maximum sentences are generally most appropriate for the worst offenders. Buchanan v. State, 767 N.E.2d 967, 973-74 (Ind. 2002). While Reed's actions of driving drunk and killing another person are grievous and should have serious consequences, there are no facts present which tend to demonstrate Reed is one of the worst offenders. We therefore reduce Reed's sentence to fifteen years with the Department of Correction, consisting of his ten-year presumptive sentence and a five-year enhancement based upon the aggravator of criminal history, with four and one-half years suspended, which represents the same proportion of suspended time as the original sentence. We remand to the trial court to impose such sentence.

The judgment of the trial court is reversed, and the cause is remanded with instructions.

BAKER, J., and MAY, J., concur.